

IN THE
Supreme Court of the United States

OCTOBER TERM, 1967

FEDERAL POWER COMMISSION, *Petitioner,*

v.

SUNRAY DX OIL COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURTS OF
APPEALS FOR THE DISTRICT OF COLUMBIA AND TENTH CIRCUITS

BRIEF FOR CONSUMER-DISTRIBUTOR GROUP

The Brooklyn Union Gas Company, Long Island Lighting
Company, Philadelphia Electric Company, and Public
Service Commission of the State of New York,
Petitioners in No. 62, Respondents in Nos. 111,
143, 144, and 231

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December 13, 1967



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OPINIONS BELOW

In these consolidated proceedings, the several petitioners request this Court to review two opinions of the Court of Appeals for the Tenth Circuit and one opinion of the Court of Appeals for the District of Columbia Circuit.

1. In Nos. 60, 61, and 62, petitioners (Federal Power Commission, United Gas Improvement Company, and the Consumer-Distributor Group) seek review of the Tenth Circuit's opinion in *Sunray DX Oil Co. v. F.P.C.*, 370 F.2d 181 (I R. 6696), which affirmed in part and reversed in part the Commission's opinion and order in *Amerada Petroleum Corp.*, Opinion No. 422, 31 FPC 623 (I R. 5769).

2. In Nos. 80 and 97, petitioners (FPC and United Gas Improvement)¹ seek review of the Tenth Circuit's opinion in *Standard Oil Co. of Texas v. F.P.C.*, 376 F.2d 578 (II R. 6885), which reversed the Commission's opinion and order in *Amerada Petroleum Corp.*, Opinion No. 501, 36 FPC 309 (II R. 6223).

3. In Nos. 111, 143, 144, and 231, petitioners (producers and FPC) seek review of the District of Columbia Circuit's opinion in *Public Service Commission of New York v. F.P.C.*, 373 F.2d 816 (IV R. 4290), which reversed in major part two separate Commission opinions and orders—*Hawkins & Hawkins*, Opinion No. 475, 34 FPC 897 (III R. 7288), and *Sinclair Oil & Gas Co.*, Opinion No. 476, 34 FPC 930 (IV R. 4171).

JURISDICTION

The judgment of the court of appeals in *Sunray DX Oil Co. v. F.P.C.* was entered on December 9, 1966, and the petitions for a writ of certiorari (Nos. 60, 61, and 62) were filed on March 9, 1967.

The judgments of the court of appeals in *Standard Oil Co. of Texas v. F.P.C.* were entered on March 27,

¹ The Consumer-Distributor Group petition for certiorari is pending in No. 503, this Term.

1967, and the petitions for a writ of certiorari (Nos. 80 and 97) were filed, respectively, on April 5 and April 18, 1967.

The judgment of the court of appeals in *Public Service Commission of New York v. F.P.C.* was entered on February 7, 1967, and the petitions for a writ of certiorari were filed, respectively, on April 26 (No. 111), on May 8 (Nos. 143 and 144), and, pursuant to an order entered May 8, 1967 extending the time to file, on June 8, 1967 (No. 231).

On October 9, 1967, this Court granted the nine petitions for writs of certiorari and consolidated the cases. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1) and Section 19 (b) of the Natural Gas Act, 15 U.S.C. § 717r (b).

STATUTES INVOLVED

Section 7 of the Natural Gas Act provides in pertinent part as follows:

(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for

which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation and without further proceedings, if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest. [52 Stat. 825 (1938), as amended, 56 Stat. 83 (1942); 15 U. S. C. § 717f(c).]

* * * * *

(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act

and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require. [56 Stat. 84 (1942) ; 15 U.S.C. § 717f(e).]

QUESTIONS PRESENTED

1. May the Federal Power Commission issue a certificate of public convenience and necessity authorizing a producer to sell natural gas to an interstate pipeline in the absence of any evidence that there is a public need for the proposed sale, and in the face of its own findings in contemporaneous cases that the purchasing pipeline is already contractually obligated to purchase more gas than it can physically take into its system?

2. May the Federal Power Commission, consistent with this Court's *Catco*² admonition to hold the price line in certificating new sales, elevate its previously determined in-line certificating level by reference to (a) the prices contained in the contracts for which certificate authority is being sought, (b) the prices contained in temporary certificates issued on an *ex parte* basis pending the outcome of hearings on the underlying applications for permanent certificates, and (c) the guideline prices contained in a Commission policy

²*Atlantic Refining Co. v. Public Service Commission of New York*, 360 U.S. 378 (1959).

statement that had been issued without notice, hearing, or record?

3. Where the Federal Power Commission, having issued *ex parte* temporary certificates to producers pending hearing and disposition of their certificate applications, determines after full hearing on those applications that the prices collected pursuant to the temporary certificates were out of line and not consistent with the public convenience and necessity, does the Commission have the power and the duty to require the producer applicants to refund the excess amounts collected under the temporary certificates?

STATEMENT OF THE CASE

Background—The Gulf Coast area of Texas, which in recent years has accounted for 17-20% of all gas sold for resale in interstate commerce, has been divided into three districts by the Texas Railroad Commission, and the state commission's classification has been followed by both the producing industry and the Federal Power Commission. The most southerly of the Gulf Coast districts is Texas Railroad Commission District No. 4, a fifteen-county area bounded on the south and west by Mexico and on the east by the Gulf of Mexico; immediately to the north along the Gulf is District 2, a ten-county area; and to the north of District 2 and stretching to the Louisiana border are the twenty-nine counties comprising District No. 3. Most of the major pipelines serving the Northeast begin in the Texas Gulf Coast and traverse these three Districts before heading into Louisiana and on north.

Although at the advent of producer regulation, in 1954, gas in the Texas Gulf Coast sold at an average price of less than 10¢ per Mcf, during the late '50's

the Commission authorized a number of new sales at higher prices, culminating in a series of orders in 1959-60 certificating new sales at prices as high as 18¢ per Mcf. These levels were arrived at, however, in Commission proceedings from which interested consumer intervenors had been excluded, and on appeal the courts held that such exclusion was improper and that the orders granting certification must be vacated, *Public Service Commission of New York v. F.P.C.*, 295 F. 2d 140 (D.C. Cir. 1961), *cert. denied*, 368 U.S. 948; *Hunt Oil Co. v. F.P.C.*, 334 F.2d 474 (5th Cir. 1964). Then, in September 1960—after its issuance of the 18¢ certificates and while the ultimately successful appeals from those certificates were pending—the Commission, acting *in camera*, issued a Statement of General Policy, 24 FPC 818, in which it announced for each producing area the “guideline” initial-price levels at which, in the absence of objection, it intended to certificate new sales. As Mr. Justice Clark was subsequently to observe, these guideline levels were based on “the *highest* permanently certificated rate in the respective areas as of September 1960,” *Wisconsin v. F.P.C.*, 373 U.S. 294 at 316 (dissenting opinion; emphasis in original). Thus, the initial-price guidelines for Districts 2, 3, and 4 were fixed at 18¢ per Mcf, but, as the Commission itself later conceded, the sales on which the Gulf Coast guideline levels were based were those which had been erroneously certificated after exclusion of the consumer intervenors, and accordingly could not be used for in-line purposes.

The Prior Gulf Coast Proceedings—The first contested Commission proceeding involving the Gulf Coast to be decided following issuance of the policy statement—and the first to be decided in accordance with this Court’s *Catco* standards—was the *Skelly* case, *Skelly*

Oil Co., Op. 362, 28 FPC 401 (1962). There, the Commission held that the proper certificating (or "in-line") level in District 4, at least for contracts entered into prior to the September 1960 policy statement, was 15¢ per Mcf. Having made that determination, however, the Commission limited its scope in three important respects: First, it declined to order the producers to refund amounts which had been collected in excess of 15¢ per Mcf under temporary certificates pending the outcome of the hearings; second, it concluded, over the dissent of two Commissioners, that it should not decide on the basis of the *Skelly* record that the in-line level had continued at 15¢ after issuance of the policy statement, and accordingly it severed from *Skelly* and set for separate hearing four dockets based on contracts entered into after September 1960; and third, by separate order (and again with two Commissioners dissenting), it revised its policy statement guideline for District 4 from the 18¢ established in September 1960 to 16¢, or 1¢ more than the in-line level it had just found in *Skelly*, 28 FPC 441. The dissenting Commissioners, unable to perceive how issuance of the *in camera* 18¢ guideline (now demonstrated by the record in *Skelly* to be excessive by 3¢) could have any effect on the in-line level, would have issued certificates conditioned at the 15¢ level to the four *Skelly* applicants having post-September 1960 contracts, and would have reduced the guideline level for the future to the 15¢ in-line price.³

³ On appeal, the District of Columbia Circuit (1) sustained the 15¢ in-line finding against producer claims that a higher price was required, and (2) reversed, at the instance of consumer petitioners, the Commission's refusal to order refunds of excess amounts collected under temporary certificates. *Public Service Commission of New York v. F.P.C.*, 329 F.2d 242 (1964), cert. denied sub nom. *Prado Oil & Gas Co. v. F.P.C.*, 377 U.S. 963.

The next contested Gulf Coast proceeding involved sales from District 3 and District 4 pursuant to contracts entered into in July of 1960. The presiding examiner found that the in-line price for both districts was 15¢ per Mcf, *Texaco Seaboard Inc.*, 29 FPC 603, but on appeal to the Commission, a majority of the Commission concluded that the in-line price for District 3 was 16¢ per Mcf, *Texaco Seaboard Inc.*, Op. 383, 29 FPC 593 (1963). Contemporaneously with that opinion, the Commission revised its District 3 guideline to 17¢, or 1¢ more than the in-line price it had just found, 29 FPC 590. Again, two Commissioners dissented, stressing, first, that the evidence demonstrated an in-line level for District 3 of 15¢, and, second, that the guideline level should properly be set at the in-line level rather than 1¢ or 2¢ in excess of that level.

The final in-line case in this series came before the Commission in December 1963, *Hassie Hunt Trust*, Op. 412, 30 FPC 1438, and involved proposed sales from all three Gulf Coast Districts under contracts dated both before and after the September 1960 policy statement. After reaffirming for the Districts 3 and 4 sales the in-line findings made in *Skelly* and *Texaco Seaboard*, the Commission found that the District 2 in-line price was 15¢ prior to the issuance of the policy statement, but, consistent with its action in *Skelly*, it severed the post-policy statement contracts for further hearing, and, consistent with the actions taken for District 4 at the time *Skelly* was adopted and for District 3 at the time *Texaco Seaboard* was adopted, it amended the policy statement to provide for a new District 2 guideline 1¢ in excess of the in-line level it had just determined, 30 FPC 1435. Once again, both actions were taken by a split Commission.

The Present Proceedings

Amerada—The four dockets severed from the *Skelly* case were consolidated with 34 other producer applications to sell gas from District 4 fields under the lead docket, *Amerada Petroleum Corporation*, CI62-1544, (28 FPC 397; I R. 4636). The *Amerada* producer contracts, which called for initial prices ranging from 15.9¢ to 19.8¢ per Mcf, had been entered into between October 1960 and August 1962, and the purpose of the *Amerada* proceeding presumably was to determine the effect, if any, that the policy statement had upon the 15¢ in-line level which had obtained in District 4 up to issuance of the statement.

The most significant evidence presented at the hearing, held in the latter part of 1962, was an exhibit sponsored by an FPC staff economist (Exh. 16; I R. 1600-25) showing price and other information for all post-1954 District 4 contracts with a price of 14¢ or more filed with the FPC.⁴ The contracts were classified into three groups: Schedule 1 showed the proposed sales for which certificate authority was being sought in the *Amerada* proceeding itself; Schedule 2 showed all sales that had been permanently certificated; and Schedule 3 showed sales being made under temporary certificates pending Commission action on final certification.

By decision issued July 23, 1963 (31 FPC 647; I R. 5315-61), the examiner held that both as a matter of

⁴ The decision to omit evidence on contracts having an initial price of less than 14¢—an omission that could only lead to a higher in-line price than otherwise—was rationalized on the ground that no party was contending for an in-line level of less than 14¢, and the omission reduced the magnitude of the witness' task in preparing his exhibit.

fact and as a matter of law the promulgation of the policy statement guidelines had no effect on the appropriate in-line level for contracts negotiated after the guidelines, and that the determination of the in-line price for such contracts should be based on the same standards—an analysis of permanently certificated contracts dated during the time period in question—that were applied by the Commission in *Skelly* and subsequent cases. Such an analysis produced an in-line level of 15¢ per Mcf, the price at which the examiner recommended that certificates be issued to the *Amerada* producers. On the question of refunds of amounts in excess of 15¢ collected under the temporary certificates, the examiner ruled that he was bound by the Commission's *Skelly* precedent (subsequently reversed on the refund point by the D.C. Circuit⁵) and he therefore declined to order refunds.

On March 23, 1964, the Commission issued its order in the case (Opinion No. 422, 31 FPC 623; I R. 5769-5804), reversing the examiner on the key finding that the in-line price for post-policy statement contracts was 15¢ per Mcf. While apparently conceding that the in-line procedure followed by the examiner and therefore consistently followed by the Commission—an analysis of permanently certificated contracts that were not suspect—would lead to an in-line finding of 15¢ per Mcf, the Commission held that the prior permanent certifications provided an inadequate sample, and that, in consequence, weight should be given to the contract prices negotiated during the period in question (whether or not certificated by the Commission), to the prices contained in temporary certificates, to the

⁵ See note 3, *supra*.

prices being requested by the *Amerada* applicants, to the 18¢ policy statement guideline, and to Commission "expertise"; consideration of these factors led the Commission to find an in-line price of 16¢ per Mcf. Commissioner Ross, dissenting, pointed out that none of the bases used by the majority to arrive at the 16¢ figure was legally permissible, and that "the rule [adopted by the majority] in this case is that when the normal evidentiary basis for establishing an in-line price is absent, then anything else will do" (31 FPC at 643; I R. 5798). On the refund question, the Commission, while noting that two months earlier the D.C. Circuit had in the *Skelly* appeal reversed the Commission's refusal to order refunds of excess amounts collected pursuant to temporary certificates, nonetheless deferred to an indefinite future date resolution of the refund matter.

Hawkins—Immediately following issuance of its *Amerada* opinion, the Commission set for hearing all pending Texas Gulf Coast certificate applications in which initial price might be an issue. Thus, by order issued March 25, 1964 (IV R. 3573), the Commission consolidated 42 pending District 2 applications, *Sinclair Oil & Gas Co. et al.*, G-16760 *et al.*; by order issued March 30, 1964 (III R. 6227), it consolidated 40 District 3 applications, *Hawkins & Hawkins et al.*, G-18077 *et al.*; and by order issued May 28, 1964, it consolidated 67 District 4 applications, *Turnbull & Zoch Drilling Co. et al.*, G-17960 *et al.* The contracts on which these 149 applications were based had, with few exceptions, been entered into between mid-1958 and December 1963 and called for prices ranging from 14.5¢ to 20¢ per Mcf.

A prehearing conference in the District 3 proceedings, *Hawkins & Hawkins*, was held on April 23, 1964, at which time the following issues were specifically noted: (1) the need of the purchasing pipelines for the gas proposed to be sold, especially in light of the take-or-pay problems which the pipelines were then experiencing; (2) the propriety of the initial prices proposed by the producers; and (3) the obligation of the producers to refund amounts collected in excess of the in-line price pursuant to their temporary certificates. Hearings were held from July 8 to July 17, 1964. On the question of need for the gas, the applicants presented no evidence to demonstrate that the pipelines were in need of the gas or, indeed, that the pipelines could take the proposed gas into their respective systems without cutting back on other gas supplies which they were contractually obligated to pay for whether taken or not. The bulk of the evidence presented at the hearings related to showing the in-line price for District 3, with testimony on this issue sponsored by both the applicants and the Staff of the Federal Power Commission. The Staff exhibit (Exh. 1; III R. 1412-48) was a comprehensive listing showing the initial prices of all producer sales contracts entered into between June 7, 1964 and December 31, 1963, and the data contained in the exhibit formed the basis for the in-line findings subsequently made by the examiner, by the Commission majority, and by the dissenting Commissioners. In addition, a number of the producer applicants presented evidence to support their position that, upon issuance of permanent certificates at the conclusion of the proceedings, they should be relieved of the obligation to make refunds of the amounts in excess of the in-line level collected under their temporary certificates.

On October 13, 1964, while the case was awaiting decision by the examiner, the Commission granted an appeal taken by the producers and ordered the examiner to take no action on the refund issue, holding that this issue should be deferred until some later date following a separate hearing on the subject (32 FPC 991, rehearing denied 32 FPC 1387; III R. 6731, 6769). On December 2, 1964, the examiner entered his decision (III R. 6775-6805), holding (1) that need had been adequately demonstrated by the fact that contracts had been entered into and deliveries had commenced under temporary certificates, and (2) that the in-line price for District 3 for the entire period under consideration (1957-63) was 16¢ per Mcf.

Nine and a half months later, on September 22, 1965, the Commission issued its order here under review. The majority decision (III R. 7291), written by Commissioner O'Connor for himself and Chairman Swidler, held (1) that the issue of public need could not be raised in a producer certificate proceeding, (2) that the in-line price for the period prior to September 28, 1960—the date of the Commission's policy statement—was 16¢ per Mcf, and (3) that the in-line price for the period following September 28, 1960 escalated to 17¢. The Commission stated that it had arrived at the 17¢ price by giving weight, *inter alia*, to temporarily certificated prices of up to 18¢, to contract prices of up to 20¢, and to three 18¢ prices that had been permanently certificated at an abridged (uncontested) hearing.* Commissioner Bagge concurred separately (III R. 7306), stating that his con-

* These three sales were the only sales during the entire period that had been permanently certificated at a price in excess of 16.5¢.

currence in the 17¢ in-line price "takes into account the existing guideline price" of 17¢ fixed by the Commission in September 1962.

Commissioners Black and Ross dissented (III R. 7308), pointing out that both as a matter of law and as a matter of sound policy the majority erred

"in relying on temporaries to support its findings, in affording weight to the sales certificated under Commission policies which since have been repudiated by the Courts and the Commission, and in affording weight to our guideline policy statement."

Sinclair—Developments in the District 2 proceedings, *Sinclair Oil & Gas Co.*, paralleled those in *Hawkins & Hawkins*. The statistical exhibits presented by the Commission Staff (Exhs. 4, 5; IV R. 703-56, 757-64) indicated that both before and after issuance of the policy statement some 80% of total contract volumes had been permanently certificated at a price of 14.2¢ per Mcf or less, and over 90% had been certificated at a price of 15¢ per Mcf or less; on the basis of these data, the Staff witness concluded that "there are no major changes concerning contracts dedicating natural gas for use in interstate commerce for the period after the Policy Statement as compared to the period prior thereto," and recommended a 15¢ in-line level for the entire 1957-64 period (IV R. 324). Following an adverse examiner's decision (IV R. 3906), exceptions were filed by the consumer intervenors (IV R. 4068, 3989) and by the Staff of the Federal Power Commission (IV R. 4076). On September 22, 1965—the same day that it issued its opinion for District 3 in *Hawkins & Hawkins*—the Commission issued its District 2 order here under

review. The majority decision (IV R. 4172), written by Chairman Swidler for himself and Commissioner O'Connor, held (1) that the consumer interests had not properly raised the issue of public need, and (2) that although the in-line price for the period immediately preceding the policy statement was 15¢ per Mcf, it had, upon issuance of the policy statement, escalated to 16¢. As in *Hawkins & Hawkins*, and for the reasons set forth in their respective opinions in that case, Commissioner Bagge concurred in the majority's result, and Commissioners Ross and Black dissented (IV R. 4193).

The Refund Orders—Although the D.C. Circuit had ruled in January 1964 that the mere fact that a temporary certificate did not contain an express refund condition did not justify the Commission's refusal to require refunds of excess amounts collected, *Public Service Commission of New York v. F.P.C. (Skelly)*, 329 F.2d 242, cert. denied sub nom. *Prado Oil & Gas Co. v. F.P.C.*, 377 U.S. 963, the Commission took no further action, either in the remanded *Skelly* case itself or in other cases where the refund issue was presented, until June 1, 1966, when the Commission directed the *Skelly* producers to refund, with appropriate interest, the amounts that had been collected in excess of 15¢ per Mcf under their temporary certificates, with the exception of amounts paid out as royalties or in state production taxes where not recoupable, *Skelly Oil Co.*, Op. 492, 35 FPC 849, appeals pending, No. 9000 et al., 10th Cir., *Skelly Oil Co. v. F.P.C.* Subsequently, in July 1966, the Commission entered similar orders in the *Amerada, Hawkins, and Turnbull & Zoch*⁷ proceedings

⁷ In September 1965 the Commission had, contemporaneously with issuance of its in-line decisions in *Hawkins* and *Sinclair*, entered an in-line opinion in *Turnbull & Zoch*—Opinion No. 478, 34 FPC 1001.

—*Amerada Petroleum Corp.*, Op. 501, 36 FPC 309; *Hawkins & Hawkins*, Op. 498, 36 FPC 149; *Turnbull & Zoch*, Op. 499, 36 FPC 164—though, strangely, no such order has ever been entered in the *Sinclair* proceeding. The July opinions added one essential clarification—since the producers could “equitably be charged with knowledge that refunds might be required” once the D.C. Circuit’s January 1964 *Skelly* decision was announced, the offset to refunds for royalties and unrecoupable taxes based on the excess collections would not be allowed after February 1, 1964, see, e.g., *Hawkins & Hawkins*, Op. 498, 36 FPC 149 at 151-152. In most instances, the state taxes (7% of sales price) are recoupable, and the normal royalty is 12.5%, so that the effect of the Commission’s refund orders was to require the refund, with interest, of approximately 87% of the excess collected prior to February 1, 1964 and 100% of the excess thereafter.

The Decisions of the Courts of Appeals

Amerada Appeal—Appeals from the Commission’s 1964 *Amerada* opinion were taken by both the consumer and producer interests, with all petitions ultimately being transferred to the Tenth Circuit.⁸ On December 9, 1966, that court issued a decision substantially adopting the producer arguments, *Sunray DX Oil Co. v. F.P.C.*, 370 F.2d 181. On the in-line issue,

⁸ *Sunray DX Oil Company*, the only party to the consolidated proceedings located in the Tenth Circuit, filed its petition for review in the Tenth Circuit within minutes after the Commission’s denial of rehearing. Although *Sunray*’s well had run dry even prior to the commencement of the hearings, the Tenth Circuit held that it had proper venue, and accordingly the petitions for review filed by the consumer petitioners in the D. C. Circuit and by the other producers in the Third, Fifth, and Sixth Circuits were transferred to the Tenth Circuit.

the court sustained the Commission's elevation of the District 4 line to 16¢. Though apparently conceding that the factors relied on by the Commission to arrive at the 16¢ price were, in fact, "suspect" under the prior court and Commission decisions, the court held that, in the circumstances of the case, reference to "suspect" prices was necessary in order to reflect properly "the price at which substantial volumes of gas are currently contracted for sale in interstate commerce" (370 F.2d at 189; I R. 6722). Judge Seth, dissenting in part, would have gone even further than the majority; in his view, reference to current market conditions would yield a figure substantially higher than 16¢. On the refund question, the court, noting its disagreement with the holding of the D.C. Circuit in the *Skelly* appeal, ruled that the Commission was without power to require refunds of excess amounts collected under temporary certificates, and accordingly ruled that the Commission erred in severing the refund question, since the only course open to the Commission was to discharge the producers from any refund liability whatsoever.

Hawkins-Sinclair Appeal — Appeals from the Commission's September 1965 opinions in *Hawkins* and *Sinclair*, taken by the producer and consumer interests, were consolidated for argument in the District of Columbia Circuit, and on February 7, 1967, the court entered its decision, *Public Service Commission of New York v. F.P.C.*, 373 F.2d 816. In an opinion written by Chief Judge Bazelon (Judge Wilbur K. Miller dissenting without opinion), the court of appeals reversed the Commission's certification of the *Hawkins* and *Sinclair* sales on the grounds that the Commission had failed to find that there was a public need for the gas proposed to be sold and that the Commission had, with-

out legal warrant, elevated the in-line level for sales to be made under post-1960 contracts. Although accepting the premise urged by the producers and the Commission that contract prices and prices in temporary certificates "reflect current conditions in the industry," the court held that the whole purpose of in-line pricing was to protect the consumer from prices arrived at in the unregulated market, not to reflect that market. Turning to the refund question, the court noted that while these appeals were pending, the Commission had entered an order directing the *Hawkins* producers to make refunds, and it assumed a *Sinclair* order would follow.

Amerada Refund Appeal—Producer appeals from the Commission's July 1966 order requiring refunds in *Amerada* were taken to the Tenth Circuit, and in March 1967 the court, on motion of one of the producer petitioners, summarily reversed the refund order, citing its December 1966 *Sunray DX* decision for the proposition that the Commission lacked power to order refunds, *Standard Oil Co. of Texas v. F.P.C.* 376 F.2d 578.

Related Cases—Petitions for certiorari presently pending before this Court in two other proceedings raise similar issues:

1. *Turnbull & Zoch*. As noted above (p. 12, *supra*), at the time the Commission instituted the *Hawkins* proceeding for District 3 and the *Sinclair* proceeding for District 2, it instituted a new District 4 proceeding, *Turnbull & Zoch*, Docket No. G-17960, which was decided by the Commission in September 1965, at the same time as *Hawkins* and *Sinclair*. The *Turnbull & Zoch* opinion—Opinion No. 478, 34 FPC 1001—was virtually identical to the *Hawkins* and *Sinclair* opin-

ions: (1) the producers were not required to demonstrate a public need for their gas as a prerequisite to certification; (2) the in-line price for District 4 was elevated 1¢ per Mcf as of September 28, 1960; and (3) action on refunds was deferred. Again, appeals were taken by both the consumer and the producer interests; this time, the first petition was that filed with the Fifth Circuit. On May 24, 1967, the court of appeals entered its decision, sustaining the producer and Commission position on need and in-line price, and sustaining the consumer and Commission position on refunds, *Continental Oil Co. v. F.P.C.*, 378 F.2d 510. The consumer petitioners have filed petitions for certiorari on the need and in-line issues (No. 520, this Term), and certain of the producers have filed petitions for certiorari on the refund question (Nos. 504, 526, and 628, this Term).

2. *Union Texas*. As part of a July 1964 determination involving Southern Louisiana sales, the Commission, consistent with its then-current practice, deferred the question of refunds of past collections of out-of-line prices under temporary certificates, *Union Texas Petroleum*, Opinion No. 436, 32 FPC 254. Although generally sustaining the Commission's opinion against various producer attacks, the Tenth Circuit, consistent with its December 1966 *Sunray DX* decision,⁹ set aside the Commission's opinion insofar as it dealt with refunds, *Pan American Petroleum Corp. v. F.P.C.*, 376 F.2d 161, March 9, 1967. Petitions for certiorari have been filed by the FPC and by the consumer interests on the refund question (Nos. 227 and 415, this Term), and by one producer on the in-line question (No. 516, this Term).

⁹ *Sunray DX Oil Co. v. F.P.C.*, 370 F.2d 181, now before this Court on writs of certiorari in the instant consolidated appeals.

SUMMARY OF ARGUMENT

I.

The Commission's unprecedented holding that an applicant for a certificate of public convenience and necessity under Section 7 of the Natural Gas Act may be granted a certificate in the absence of any evidence that there is, in fact, a public need for the gas proposed to be sold is contrary to the statute and to the entire concept of public convenience and necessity. The Commission's dereliction in this regard precluded any consideration of such vital elements of public convenience and necessity as market demand and conservation; further, in view of the serious oversupply situation of the pipeline purchasers, the Commission's certification of these additional sales will serve to increase the costs—without any corresponding benefit—to the pipelines and their customers. The court of appeals was clearly correct in holding

“[W]hen a party makes a non-frivolous claim that there is no public need for the gas the FPC must give considered reasons if it decides otherwise. Its decision must be made *before* it grants a permanent certificate to a producer.”

II.

In *Atlantic Refining Co. v. Public Service Commission of New York (Catco)*, 360 U.S. 378 (1959), this Court admonished the Commission to protect the consumer against potentially excessive prices for new sales of gas by exercising its certificate-conditioning power to hold the price line pending the determination of just and reasonable producer rates. Immediately following *Catco*, the courts of appeals made it clear

that in determining the line to be held the Commission was required to look to prices which had been subjected to meaningful regulatory control, since untested prices were "suspect" and would form an unreliable standard.

In the cases here under review, the Commission, departing from precedent, elevated its previously determined in-line levels by according controlling weight to the prices proposed by the certificate applicants, the prices contained in *ex parte* temporary certificates, and the prices contained in the Commission's policy statement; each of these untested prices was held to reflect current market conditions. It was, however, precisely because reliance on current market conditions was inadequate to protect the consumer from excessive prices that in-line price-conditioning became necessary, and as Judge Bazelon noted in one of the decisions below (IV R. 4306):

"The need for the FPC, and for a concept like in-line prices, arises primarily because the unregulated market place cannot protect the consumer adequately. Congress created the FPC to protect the consumer from the market place, not simply to reflect it. The Commission should not rely upon prices over which it has not exercised careful control."

III.

In order to assure protection of the consumer from the time the gas first enters the interstate market, the producers must be required to refund the excess amounts collected under their temporary certificates, *Public Service Commission of New York v. F.P.C.*, 329 F.2d 242 (D.C. Cir. 1964). The fact that the temporary certificates did not contain an "express" refund condition is irrelevant: by their very nature, temporary certificates are not, and cannot be, final, and there is

no basis for holding that the producers acquired, by their *ex parte* temporary certificates, a vested right to charge excessive rates—with no consumer right to redress—during the long pendency of the temporary certificates.

ARGUMENT

I. THE COMMISSION MAY NOT AUTHORIZE NEW SALES OF NATURAL GAS IN INTERSTATE COMMERCE IN THE ABSENCE OF A SHOWING OF PUBLIC NEED FOR SUCH SALES.

Concurring in the position urged by the consumer petitioners below, the Court of Appeals for the District of Columbia Circuit held that the Commission erred in issuing certificates authorizing the *Hawkins* and *Sinclair* producers to sell their gas in interstate commerce in the absence of any finding that the proposed sales were needed by the public; the court deemed unpersuasive the Commission's contention that the question of need could be deferred to a subsequent hearing on the purchasing pipeline's certificate application. Although the court of appeals' reversal on the need issue has not been challenged in this Court by the Commission, it has been attacked by certain of the producers. Notwithstanding our conviction that the decision of the court below was eminently correct, we acquiesced in the grant of certiorari on this issue in order to clarify the conflict between the decision below and the subsequent contrary decision of the Fifth Circuit in *Continental Oil Co. v. F.P.C.* (*Turnbull & Zoch* appeal), 378 F.2d 510 at 526, petitions for certiorari pending, Nos. 504, 520, and 526, this Term.

The relatively recent emphasis on the need issue may be explained briefly. In the earlier producer certificate

cases, the consumer interests were willing to stipulate that there was a need for the gas in order to focus the contest on the heavily litigated issue of price. And, indeed, in the mid and late '50's, there was little evidence to suggest that there was not in fact a public need for the sales that were being proposed.¹⁰ By the early 1960's, however, it was becoming increasingly clear that most, if not all, of the pipelines purchasing in the Texas Gulf Coast and Southern Louisiana had worked themselves into a serious oversupply situation, whereby they had contractually obligated themselves to take, or at least to pay for, larger volumes of gas than they were physically capable of putting through their systems. This obviously resulted in considerable added cost to the pipelines, and, beginning with two 1964 opinions, the Commission has indicated a willingness to permit the pipelines to pass these increased costs along to the consumer in the form of higher rates. *United Gas Pipe Line Co.*, Op. 428, 31 FPC 1180 at 1186-87, 1191-92; *United Gas Pipe Line Co.*, 32 FPC 1515 at 1519. Accordingly, when the *Hawkins* and *Sinclair* (and the related *Turnbull & Zoch*) proceedings came on for hearing in mid-1964, the consumer intervenors declined to stipulate that there was a public need for the proposed sales. Despite the absence of any stipulation, the producers presented no evidence on the question of need, preferring to rely on their legal position—ultimately rejected by the court below—that a

¹⁰ But see *Atlantic Refining Co. v. Public Service Commission of New York (Catco)*, 360 U.S. 378 at 393 (1959):

"Nor do we find any support in the record for the conclusory finding on which the order was based that 'the public served through the Tennessee Gas system is greatly in need of increased supplies of natural gas.' "

producer applicant is entitled to a certificate without a showing of need.

The court below, relying on the decisions of this Court, had little difficulty in finding that both market demand and conservation were elements of public convenience and necessity. It noted that in *Atlantic Refining Co. v. Public Service Commission of New York (Catco)*, 360 U.S. 378 (1959), this Court "seems to have imposed on the producer the burden of proving public need before certification" (373 F.2d at 821; IV R. 4295), and that in *F.P.C. v. Transcontinental Gas Corp.*, 365 U.S. 1 (1961), this Court "decided that conservation was relevant to public convenience and necessity" (373 F.2d at 821; IV R. 4296). In concluding on the need issue, the court below summarized its holding as follows (373 F.2d at 823; IV R. 4299; emphasis in original):

[W]hen a party makes a non-frivolous claim that there is no public need for the gas the FPC must give considered reasons if it decides otherwise. its decision must be made *before* it grants a permanent certificate to a producer."

And indeed, as this Court has repeatedly held, see, *e.g.*, *F.P.C. v. Texaco Inc.*, 377 U.S. 33 at 42-44 (1964); *F.P.C. v. Hunt*, 376 U.S. 515 at 525-26 (1964), the Congressional purpose, in adding Sections 7(c) and 7(e) to the Natural Gas Act in 1942, was to give the Commission an opportunity to scrutinize all aspects of a proposed sale *prior* to its commencement, H.R. Rep. 1290, 77th Cong., 1st Sess., pp. 2-3.

Four months after the D.C. Circuit's decision here, this Court criticized the Federal Power Commission's eagerness to issue a license under the Federal Power Act without first determining whether the proposed

project was really needed, *Udall v. F.P.C.*, 387 U.S. 428. "We cannot assume," said the Court, "that the Act commands the immediate construction of as many projects as possible," 387 U.S. at 449. So here, the Commission's goal cannot be merely the certification of as many sales as possible, but must be the certification of only those sales which are required by the public interest.

II. THE COMMISSION MAY NOT, IN CERTIFICATING NEW SALES, ELEVATE ITS PREVIOUSLY DETERMINED IN-LINE LEVEL BY REFERENCE TO CONTRACT PRICES, TEMPORARILY CERTIFICATED PRICES, OR GUIDELINE PRICES.

In each of the three in-line opinions here under review, the Commission held that upon the issuance of the September 1960 policy statement the in-line level for each of the three Texas Gulf Coast pricing areas escalated by 1¢ per Mcf—from 15¢ to 16¢ in Districts 2 and 4, and from 16¢ to 17¢ in District 3.¹¹ On appeals

¹¹ While the object of our attack in these appeals is the Commission's *elevation* of its previously determined in-line levels, we would like to make clear that even the prior levels were unduly generous and in excess of the levels we had originally supported. As a matter of logic, we submit that the most appropriate line to be held was the line obtaining in June 1954, when the Commission first began to exercise its regulatory jurisdiction over producers; as noted *supra*, p. 6, the average price of gas in the Texas Gulf Coast in 1954 was approximately 10¢ per Mcf. By the time the first post-*Catco* Texas Gulf Coast certificate proceedings came to hearing in the late '50's and early '60's, however, prices had escalated to 14.6¢ per Mcf, and the Commission ultimately fixed an in-line level for Districts 4 and 2 of 15¢ per Mcf, and for District 3 of 16¢ per Mcf, see cases cited *supra*, pp. 7-9. Significantly, in the important Southern Louisiana pricing area—the Louisiana Gulf Coast—the Commission made its original in-line determination by reference to 1954-56 contracts, *Continental Oil Co.*, 27 FPC 96 (1962), and it has held that original line consistently, without escalation, in all Southern Louisiana cases since, see, e.g., *Tennessee Gas Pipeline Co.*, Op. 528, 38 FPC — (Sept. 26, 1967).

by the consumer interests, the Tenth Circuit affirmed the Commission's action in *Amerada* (District 4), and the District of Columbia Circuit reversed the Commission's action in *Hawkins* and *Sinclair* (Districts 3 and 2). Both courts noted that, in finding the post-1960 in-line level, the Commission had departed from its prior practice of relying only upon permanently certificated prices that were not suspect and had, in the present cases, relied on uncertificated contract prices, temporarily certificated prices, and the guideline prices contained in the Commission's policy statement. Both courts accepted the Commission's premise that these untested and essentially unregulated prices reflected current market conditions. But whereas the Tenth Circuit believed that this factor justified the use of such prices and the consequent escalation of the in-line level, the District of Columbia Circuit held that the use of such prices was barred by the essential purpose of in-line pricing, which was to protect the consumer from the effects of the unregulated market place.

At the outset of our discussion, we would stress that in-line pricing, though only an interim regulatory device, remains of enormous importance so long as just and reasonable rates are not fixed by the Commission. It may be noted that, under its area rate-making approach, the Commission has thus far fixed just and reasonable rates for only one area—the Permian Basin—which covers about 10% of natural gas production. For the remaining 90% of natural gas sold in interstate commerce, in-line pricing continues to be the only effective regulatory control. And because every cent

per Mcf translates itself into millions of dollars,¹² the controversy has been intense.

Despite the controversy, there is no disagreement that the Federal Power Commission may certificate new sales of gas in interstate commerce only where the proposed price is "in-line". "The question is," as Judge Bazelon noted in the *Hawkins-Sinclair* appeal, "in line with what?" (373 F.2d at 824, App., *infra*, 1a). The producers, the majority of the Commission, and the Tenth Circuit believe that new sales should be certificated at prices that are in line with current, essentially unregulated market levels, as measured by the prices currently being negotiated for proposed sales, the prices contained in *ex parte* temporary certificates, and the guideline prices contained in the Commission's policy statement. The consumer interests, the examiners in *Amerada* and *Hawkins*, the Commission staff, the dissenting Commissioners and the District of Columbia Circuit believe that new sales should be certificated at prices that are in line with existing prices that have been tested by the regulatory process, *i.e.*, prices which have previously received permanent certification following hearing, and which are not suspect because they are under judicial review or otherwise. We believe that the legal necessity for the latter standard is persuasively demonstrated by Judge Bazelon's lucid and

¹² As the then Chairman of the Commission noted in September 1961 (see 31 FPC 655; I R. 5330):

"A difference of a cent a thousand cubic feet is equal to \$130,000,000 a year. A cent a thousand difference in the value of the estimated proven reserves is equal to approximately 2½ billion dollars These are indeed astronomical figures, even in Texas, so large that in computing them I checked several times to be sure I was not running in an extra string of zeros."

comprehensive discussion of the in-line issue in his *Hawkins-Sinclair* decision; and that discussion is included as an appendix to this brief. While we do not believe we can improve on Judge Bazelon's reasoning, we attempt, in the succeeding paragraphs, to emphasize certain aspects of his opinion as it analyzes and rejects the Commission's approach.

We begin with Commissioner Ross' critique of the Commission's 16¢ determination in *Amerada* (31 FPC at 644; I R. 5800):

"The principal error of the majority is found on page 14 [31 FPC at 634; I R. 5785] where it lists those contracts on which it bases its in-line conclusion. Of the 38 contracts listed having prices in excess of 15¢, 36, or about 95 percent, *are the very contracts whose price is being investigated in this case*. This type of bootstrap rationalization is legally indefensible." (Emphasis in original.)

The Tenth Circuit, in approving the Commission's standard, held (370 F.2d at 189; I R. 6722):

"An-in-line price is intended to reflect the price at which substantial volumes of gas are currently contracted for sale in interstate commerce. This determination cannot be made if all current sales are within the 'suspect price' doctrine because of objections to them."

Commenting on the Tenth Circuit's standard, Judge Bazelon declares (373 F.2d at 828-29; App., *infra*, p. 11a):

"Moreover, we cannot accept the reasoning of the Tenth Circuit's opinion as it applies to this case. Temporaries and contract prices do reflect current conditions in the industry because they reflect real dealings in the market place. This

recognition, far from justifying reliance upon these prices, provides a reason for disregarding them. As we have noted, the need for in-line pricing arises because the unregulated market place cannot protect the consumer adequately. Reliance on prices over which there has been no careful regulatory control contradicts this need."

Indeed, as Judge Bazelon correctly points out (373 F.2d at 829; App., *infra*, p. 13a), the very purpose of Section 7 negatives the Tenth Circuit's current market price approach:

"The purpose, quite simply, of a § 7 proceeding is to protect the consumer until the FPC can determine the just and reasonable rate. This latter determination depends, in part, on current conditions in the industry. The determination of an in-line price should not depend on current conditions, unless, in a particular case, there is something special about these conditions which requires the FPC to sacrifice some of the consumer's protection. . . . But the FPC has advanced no such reasons in this case. Here the FPC used temporarily certificated and contract prices in an automatic, arithmetical way to raise the in-line price, without attempting to justify the decrease in consumer protection."

Judge Bazelon also observes, as Judge J. Skelly Wright had in an earlier in-line appeal,¹³ that maintaining an in-line price at the level fixed in earlier cases in no way results in a price freeze,¹⁴ since under

¹³ *Atlantic Refining Co. v. F.P.C.*, 316 F. 2d 677 at 679 (D.C. Cir. 1963). The Tenth Circuit expressed its disagreement with Judge Wright's formulation (370 F. 2d at 189-90; 1 R. 6723-24).

¹⁴ The difference between freezing the in-line price—i.e., the initial price at which a certificate is issued—and freezing the effective price the producer may collect should be noted. No party in this proceeding has suggested freezing the effective price.

Section 4 of the Act a dissatisfied producer can file and, within six months at most, make effective his original contract price; this higher price is subject to refund, however,

“if the FPC later finds that the price charged was not just and reasonable. In this way, the consumer is afforded at least some protection against excessive prices.” (373 F.2d at 825; App., *infra*, p. 5a; footnote omitted.)

Thus, while the logic of in-line pricing, as correctly found by the D.C. Circuit’s decision (373 F.2d at 830; App., *infra*, p. 13a),¹⁵

“may cause the in-line price to be frozen temporarily during the interim period between sales of gas and the rate determination under § 4 or § 5 of the Act, [t]his kind of freeze seems to be required by the logic of CATCO and in-line pricing.”

In concluding on the in-line issue, we would note that the Commission at no point found that the prior in-line levels would not bring forth adequate supplies of gas,¹⁶ or that the elevated in-line levels would bring forth greater supplies of gas, or that the consumer was entitled to less protection from potentially excessive initial prices under contracts dated after September 28, 1960 than from potentially excessive initial prices under contracts dated prior thereto.

¹⁵ See note 14, *supra*.

¹⁶ It is generally accepted that the 1960-64 period to which the elevated in-line prices were applied was a period of excess supply.

III. THE COMMISSION HAS BOTH THE POWER AND THE DUTY, ON PERMANENT CERTIFICATION, TO REQUIRE CERTIFICATE APPLICANTS TO REFUND EXCESS AMOUNTS COLLECTED UNDER TEMPORARY CERTIFICATES.

Section 7(c) of the Natural Gas Act provides that no person may commence a sale of natural gas in interstate commerce without first obtaining a certificate of public convenience and necessity from the Federal Power Commission; the section further provides that a certificate shall issue only after a hearing on the application and that the Commission shall afford notice of such hearing to the interested public. It has been through the operation of these provisions that the present parties have been able, over the years, to challenge proposed initial prices which appeared to be inconsistent with the public interest because they were out of line or were potentially excessive, and it has been through the operation of these provisions that we and other consumer interests have been able to secure judicial relief, in *Cateo* and the subsequent cases, when the Commission has certificated out-of-line prices.

At about the time that consumer interests were first challenging the FPC's unconditional certification of out-of-line prices, the Commission inaugurated the practice of issuing "temporary" certificates as a matter of routine to every producer-applicant who requested one—and in time virtually every producer-applicant included a request for one with his application for permanent certification. Although the statute seems quite clearly to indicate that temporary certificates are to be issued only in cases of emergency to the public,¹⁷ Al-

¹⁷ A proviso to Section 7(c) reads:

"Provided, however, That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing pending the determination of an application for a certificate"

gonquin Gas Transmission Co. v. F.P.C., 201 F.2d 334 (1st Cir. 1953), the Commission in the late 1950's determined that such certificates should be issued for the benefit of the producers, and it accepted, as falling within the definition of "emergency", a producer claim of economic detriment resulting from inability to commence a sale pending the conclusion of the statutorily required hearing.

While the Commission's power to issue temporary certificates under such circumstances appeared rather dubious, the consumer interests—to the extent they knew of such temporaries (and it should be emphasized that temporary certificates are issued *ex parte* by letter from the Secretary, and do not appear in the FPC's regular list of orders)—were at first not unduly concerned, since it seemed clear that there could be no irrevocable injury to the consumer from temporary certification: Prior to its August 1962 *Skelly* decision, the Commission had uniformly and repeatedly held that any error in granting temporary certification could and would be corrected by a refund order on permanent certification. *El Paso Natural Gas Co.*, Op. 335, 23 FPC 369 at 378 (1960), affirmed, *Texaco Inc. v. F.P.C.*, 290 F. 2d 149 (5th Cir. 1961); *Socony Mobil Oil Co.*, 26 FPC 532 at 533 n. 1 (1961), 27 FPC 347 (1962); *Texaco-Seaboard, Inc.*, 27 FPC 15 and 482 (1962); *Continental Oil Co.*, Op. 351, 27 FPC 96 (1962).¹⁸ Moreover, because the prices contained in temporary certificates were, by definition, subject to further Com-

¹⁸ In requiring refunds of excess amounts collected under a temporary certificate which contained no express refund requirement, the Commission stated (27 FPC 96 at 110) that the statutory language under which temporaries are issued "appears to contemplate a continuous course of adjustment until the time that a final order determines the conditions under which a permanent certificate shall be issued."

mission review, they could not be (and prior to these cases had not been) used in determining the in-line level for other sales.

In *Skelly*, however, the Commission broke with precedent and held, in effect, that a temporary certificate, even if erroneous, did create permanent rights, for it refused to order refunds of those amounts collected under temporary certificates which, upon permanent certification, were found to be in excess of the in-line level; it attempted to justify its result on the ground that the temporaries contained no express-refund condition. The present parties, who were intervenors in *Skelly*, appealed that ruling to the D.C. Circuit; at the same time, a second appeal, challenging the FPC's power to issue temporary certificates as a matter of routine, was filed in the same court, and the two appeals were decided by the same panel in January 1964. In its decisions, the D.C. Circuit, while sustaining the FPC's power to issue temporary certificates, *Public Service Commission of New York v. F.P.C.*, 327 F. 2d 893, held that the Commission was legally obligated to protect the consumer against excessive, out-of-line prices collected under such certificates, *Public Service Commission of New York v. F.P.C.*, 329 F. 2d 242; specifically, the court held that the mere fact that a temporary certificate did not contain an express refund condition did not justify the Commission's refusal to require refunds of excess amounts.

Although the Commission's *Amerada* decision was issued after the D.C. Circuit's *Skelly* decision, the Commission declined to order refunds of the excess amounts, and instead deferred the issue. On appeal, the present parties challenged the Commission's failure to order refunds consonant with the D.C. Circuit's opinion in *Skelly*; the producers, on the other hand, as-

serted that the D.C. Circuit's opinion was incorrect, that the FPC had no power to require refund of the excess amounts collected under the temporary certificates, and that as a result the Commission had no power to sever the issue out for later determination. The Tenth Circuit decided in favor of the producers. Subsequently, it reaffirmed its decision by summarily reversing the Commission's July 1966 *Amerada* refund order.

While we can agree with the Tenth Circuit that it would have been preferable for the Commission, in issuing temporary certificates to producers, to include an automatic refund provision,¹⁹ we fail to see how the Commission's failure to include such a provision in a temporary certificate, granted *ex parte* at the request of and for the sole benefit of the producer applicant, should result in the producer's gaining any permanent right, as against the consumer, to retain excess amounts collected under the temporary authorization.

Given the nature of temporary certificates, it necessarily follows that the Commission not only has the power but the duty to require refunds of excess amounts collected thereunder, and neither the power nor the duty is attenuated merely because the Com-

¹⁹ By Order No. 336, 28 Fed. Reg. 2844, effective February 1967, the Commission added § 2.63 to its Rules and Regulations, 18 CFR § 2.63, which provides as follows:

"For the purpose of protecting consumers from the exaction of out-of-line rates, temporary certificates authorizing sales of natural gas by independent producers in areas where just and reasonable rates have not been determined will contain an express refund condition fixed at a level two cents below the applicable guideline rate set forth in the statement of General Policy No. 61-1, as amended (§ 2.56 of this part), or the previously determined applicable in-line rate, whichever is lower"

mission neglected, in bestowing the benefit of a temporary certificate on a producer, to include an express warning that refund of amounts in excess of the in-line level would have to be made on permanent certification, *Public Service Commission of New York v. F.P.C.*, 329 F. 2d 242 (D.C. Cir. 1964), *cert. denied sub nom. Prado Oil & Gas Co. v. F.P.C.*, 377 U.S. 963. Indeed, if temporary certificates were held to create permanent, irrevocable rights, not subject to modification upon permanent certification, then the temporary certificates themselves would be of dubious validity, cf. *Public Service Commission of New York v. F.P.C.*, 327 F. 2d 893 (D.C. Cir. 1964).

This Court recently sustained the Commission's power to order refunds of out-of-line amounts in similar circumstances on reasoning directly applicable. In *United Gas Improvement Co. v. Callery Properties, Inc.*, 382 U.S. 223 (1965), the issue was whether refunds should be ordered of out-of-line amounts collected under unconditioned permanent certificates while the certificates were under judicial review. The Court stated:

"While the Commission 'has no power to make reparation orders' . . . it is not so restricted where its order, which never became final, has been overturned by a reviewing court. Here the original certificate orders were subject to judicial review; and judicial review at times results in the return of benefits received under the upset administrative order: . . . An agency, like a court, can undo what is wrongfully done by virtue of its order. Under these circumstances, the Commission could properly conclude that the public interest required the producers to make refunds for the period in which they sold their gas at prices exceeding those properly determined to be in the public interest." 382 U.S. at 229-30 (citations and footnote omitted).

So here, a temporary certificate is, by its nature, not a final order, and the Commission retained the power to undo what was wrongfully done by virtue of the temporary authorization.

CONCLUSION

For the foregoing reasons, the consumer-distributor group respectfully requests this Court (1) to affirm the judgment of the Court of Appeals for the District of Columbia Circuit (Nos. 111, 143, 144, and 231), (2) to vacate the judgments of the Court of Appeals for the Tenth Circuit (Nos. 60, 61, and 62, and Nos. 80 and 97), and (3) to remand the Tenth Circuit cases to that court with directions to remand the proceedings to the Commission on the in-line issue and to affirm the Commission on the refund issue.

Respectfully submitted,

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December 13, 1967